SUPREME COURT, U. S.

No. 73-541

DEC 5 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

BARRY BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1973. Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to September 24, 1973, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the photographic display presented to witnesses for identification purposes prior to petitioner's arrest was impermissibly suggestive.

2. Whether identification evidence at trial was improperly adduced.

3. Whether the identification evidence was sufficient to sustain the conviction.

4. Whether the court of appeals was required to issue a more detailed opinion.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner and a co-defendant were convicted of bank robbery and assault, in violation of 18 U.S.C. 2113(a), (b), and (d). Petitioner was sentenced to a total of 22 years' imprisonment. The court of appeals affirmed (Pet. App. A2).

The evidence shows that at about 11:45 a.m. on April 4, 1972, the Suburban Trust Company in Riverdale, Maryland, was robbed by three Negro males (T. 437)[1] who disguised their appearances (T. 401-403). They ordered everyone in the bank to get on the floor (T. 402). After three to four minutes they left the bank (T. 407, 413) and made their getaway in a taxicab, which had been commandeered by a fourth individual immediately prior to the holdup (T. 435-437). They took the cab to a parking lot about half a mile from the bank (T. 243-244) and transferred to a silver Cadillac (T. 243, 645). While driving off the parking lot, the Cadillac struck another car, causing a witness to record the license number of the Cadillac (T. 645). The Cadillac was recovered a week later about two blocks from petitioner's home, and the same distance from his place of employment (T. 233, 236-237). The silver Cadillac belonged to Joanne Smith, who testified that on the same date, at about 8:30 a.m.,

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[1] "T." refers to the trial transcript.

petitioner and the co-defendant had borrowed the car (T. 71-72). Later in the morning, the co-defendant called Miss Smith and directed her to report her automobile as stolen (T. 73-74). When she asked the reason, she was told it was none of her business (T. 74). During the conversation, Miss Smith recognized petitioner's voice in the background (T. 89-90).

The evidence connecting petitioner with the bank robbery was adduced in several ways. The jury was asked to compare the physical characteristics of petitioner with those of the bank robbers depicted in films made by surveillance cameras in the bank (T. 223, 230-231) and in still prints made from the films (T. 226). Miss Smith identified petitioner from the still prints (T. 80-85) and said he was wearing the same or a similar cap on the morning of the robbery (T. 85).

Rossie Willford, Jr., an employee at a service station across the street from the bank, positively identified petitioner at trial as one of three men he observed loitering at a bus stop near the bank (T. 495) for about half an hour prior to the robbery (T. 523-524, 525, 529-530). He testified to his prior photographic identification of petitioner (T. 535, 1032-1033)[2] and his inability to identify petitioner at the pre-trial corporeal lineup (T. 526).[3] Howard Isaacs, the driver of the commandeered taxi,

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[2] The spread of seven photographs from which witnesses were asked to choose is depicted at Pet. App. A4, A5 and is discussed below. Apparently, petitioner's photograph was in the spread because of Miss Smith's statements to the police on the day of the robbery.

[3] The lineup is depicted at Pet. App. A6. None of the witnesses was able to pick petitioner out of the lineup. Counsel cross-examined each identification witness on the failure to identify petitioner at the lineup and argued this point to the jury (T. 1227-1228).

testified that petitioner resembled one of the men he saw fleeing the bank (T. 447). He had not been asked to look at the photographic spread, but admitted that he had been unable to identify petitioner at the lineup (T. 449). William Diggs, the proprietor of the service station, made no courtroom identification and testified that he had been unable to make an identification at the lineup. However, he did testify that he had previously identified petitioner from the photographic spread as strongly resembling, perhaps identical to, one of the men loitering at the bus stop (T. 483-486, 1032). Cody King, a witness at the automobile switch scene, was unable to make a courtroom identification (T. 635) and had not attended the lineup. However, he stated that he had identified petitioner from the photographic spread as strongly resembling one of the individuals he saw running to the silver Cadillac (T. 632-634, 642-643). David Parker, a customer in the bank, testified that as he entered the bank he observed two individuals outside who resembled in size and stature two of the bank robbers (T. 556, 560-561). An FBI agent testified that Parker had previously made a photographic identification of petitioner as bearing a resemblance to one of the individuals he observed outside the bank, who entered the bank during the robbery (T. 1033). Parker was unable to make a courtroom identification and stated that he had been unable to identify petitioner from the photograph of the lineup (T. 566-568). Two witnesses from the bank positively identified the co-defendant as one of the robbers (Pet. 10, n. 5). In addition, petitioner's fingerprint was found on a beer can left on the parking lot near where the Cadillac had been parked.

Petitioner's employer, testifying for the government, stated that petitioner had worked the day of the robbery, but that he believed petitioner had gone to lunch

early that day, perhaps at 11 a.m. (T. 368-369). He further acknowledged that it was possible that he had told an FBI agent that he had docked petitioner an hour's pay that day because he had taken extra time for lunch (T. 371). He also testified that petitioner had arrived at work that day at 8 or 8:30 a.m., but admitted he might have told the prosecutor previously that petitioner's arrival had been at about 9 a.m. (leaving enough time to drive to work from Miss Smith's house) (T. 378-381).

Petitioner did not testify. His statement to the FBI that he had left work at about 12:15 p.m., at lunch at home, and returned to work at 1:00 p.m. was introduced at trial (T. 984-985). Petitioner's wife testified in accord with this statement (T. 1109, 1118). However, evidence was introduced that she had previously told the FBI that she had not seen her husband during the day of the robbery (T. 1144-1145). Petitioner's sister contradicted both petitioner and his wife, stating that petitioner had eaten lunch at her house that day (T. 1121).

ARGUMENT

1. Petitioner contends that the pre-arrest photographic identification procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." quoting *Simmons* v. *United States*, 390 U.S. 377, 378. Specifically, he contends that his photograph stood out from among the rest. However, an examination of the photographic spread shown to the witnesses (Pet. App. A4, A5) reveals that all seven were medium to dark complexioned Negro men, three had medium length "natural" hair (photographs D, E, and G), and two had mustaches (photographs B and E). Although it is true that petitioner's hair is a little longer and his mustache thicker than the others, it cannot be

said that petitioner's photograph (E) was "in some way emphasized," *Simmons, supra,* 390 U.S. at 383, or that the police were, in effect, saying "This is the man," *Foster* v. *California,* 394 U.S. 440, 443.[4] The trial court ruled that the procedure did not violate petitioner's rights (T. 360), and the court of appeals agreed. The issue does not require further review.

2. There was no defect in the identification procedure at trial.

a. Petitioner claims that the method used by the prosecutor to examine identification witnesses was improper. In the case of witness Diggs, the prosecutor asked him to choose the photograph he had previously selected from the photographic spread and, after he did so, asked him if he recognized anyone in the courtroom. Diggs stated that petitioner resembled the man in the photograph he had chosen, but he could not state that petitioner resembled any of the men he had seen at the bus stop (T. 483-486). In other circumstances, the procedure of asking a witness at trial to take another look at a photographic spread from which he had previously picked the defendant, and then asking him to identify the defendant in court, might be improperly suggestive.

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[4] Petitioner's reliance (Pet. 15) on *Foster* v. *California,* 394 U.S. 440, and *Mendoza-Acosta* v. *United States,* 430 F. 2d 516 (C.A.D.C.), is misplaced. In *Foster,* although the defendant was about six feet tall and wearing a leather jacket similar to the one worn by the robber and was placed in a lineup with two men, both about five and a half feet tall, the witness only "thought" he was the man, but was not sure. After a one-to-one confrontation he still was not certain. A second lineup was held, in which only the defendant was a repeat from the first lineup. In suppressing the now positive identification, the Court stated that the effect of the repetition was to tell the witness that this was the man to identify. In *Mendoza-Acosta,* the defendant was the only Mexican with a mustache in a lineup with three Anglo-Saxon looking men.

Here, however, the procedure did not prejudice the petitioner, since it did not result in a courtroom identification. Thereafter, because of counsel's objections, the prosecutor did not ask any other witness to look through the photographic spread until the witness had attempted a courtroom identification, although he did ask about the fact of their having made a prior identification. After the witness had attempted a courtroom identification, he was questioned about the prior photographic identification. There was nothing unduly suggestive about this latter procedure.

b. Petitioner claims that the prior photographic identifications were not admissible, at least not as part of the government's case-in-chief. However, prior identifications are admissible on direct examination not only to corroborate a courtroom identification, but as independent evidence, whether or not there has been a courtroom identification. See *Gilbert* v. *California,* 388 U.S. 263, 272 n. 3; *United States* v. *Sacasas,* 381 F. 2d 451 (C.A. 2). The witnesses were subjected to cross-examination, and counsel argued the identification to the jury (T. 1227-1228, 1237-1238, 1240-1242, 1247).

3. Petitioner contends that the identification evidence was insufficient to sustain the conviction. There were six identification witnesses,[5] as well as the robbery film

[5] Although four of the identification witnesses were only able to testify as to resemblance, such evidence is admissible and may be considered by the jury to constitute a basis for a guilty verdict. *United States* v. *Brooks,* 449 F. 2d 1077 (C.A. D.C.). In the portion of the opinion in *Brooks* cited by petitioner (Pet. 11), the court was discussing its holding that, assuming the resemblance evidence was tainted by a pretrial confrontation, the admission was harmless due to other evidence in the case.

It is not surprising that there were few positive identifications in this case, since the robbers were disguised and ordered the people in the bank to lie on the floor. Even so, courtroom identifications by Miss Smith and Mr. Willford, as well as the prior identification by Mr. Diggs, were positive.

and the fingerprint on the beer can, from which the jury could draw its conclusion that petitioner was one of the bank robbers. The testimony of Diggs and Willford placed petitioner at the bus stop near the bank just prior to the robbery, and Parker placed petitioner outside the bank just before the robbery. Parker also placed petitioner inside the bank during the robbery, as did Miss Smith. The jury could draw its own conclusions from viewing the films and stills of the robbery. Isaacs saw petitioner fleeing the bank; King and the fingerprint placed petitioner at the automobile switch scene. Miss Smith placed petitioner with the co-defendant both before and after the robbery, and the co-defendant was positively identified by two bank witnesses. The abandoned automobile was found two blocks from petitioner's residence and his place of employment. Viewed in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, there was sufficient evidence to sustain the identification of petitioner as one of the men who robbed the bank.

4. Petitioner claims that the court of appeals had the obligation to write an opinion giving its *ratio decidendi.* Contrary to petitioner's suggestion (Pet. 18 n. 13), the court of appeals did specifically address itself, albeit briefly, to two of the issues raised below. Moreover, the courts of appeals have wide latitude in their decision whether or how to write opinions. *Taylor* v. *McKeithen,* 407 U.S. 191. See *United States* v. *Coefield,* 476 F. 2d 1152, 1163 n. 2 (C.A. D.C.). The increase in the caseloads of courts of appeals has led the courts to dispense altogether with writing opinions in certain cases. See *N.L.R.B.* v. *Amalgamated Cloth. Wkrs. of Amer., AFL-CIO, L. 990,* 430 F. 2d 966 (C.A. 5). The court of appeals did not act improperly in writing a brief opinion dealing with only two of the issues raised.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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